BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEREMY J. FALLEY	)	
Claimant	)	
	)	
VS.	)	
	)	
AMERICAN RECOVERY SPECIALISTS	)	
Respondent	)	Docket No. 1,068,066
	)	
AND	)	
	)	
UNKNOWN	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the April 7, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Michael L. Snider of Wichita, Kansas, appeared for claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent.

Respondent contends claimant is an independent contractor and not covered by the Workers Compensation Act. The ALJ determined claimant was an employee of respondent at the time of his December 5, 2013, accident and approved claimant's request for medical treatment. The ALJ specifically found respondent controlled the relationship between claimant and respondent, respondent could require claimant to perform job duties, and respondent could control the manner in which those duties were performed. The ALJ ordered respondent to pay both claimant's unauthorized medical treatment and all reasonable and related medical bills.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 13, 2014, Preliminary Hearing and the exhibits, and the transcript of the March 24, 2014, deposition of Charles Wilson and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent maintains "the weight of the evidence demonstrates that when all factors are considered, including the primary factor of the right to control, [claimant] in performing his activity as a field adjustor was an independent contractor and not an employee of [respondent]."[1] Respondent also argues comity applies to an Oklahoma Court of Civil Appeals decision that found a field adjustor was an independent contractor and not an employee of respondent in a similar case.

Claimant contends the evidence clearly demonstrates his work activity was performed as an employee, and he was not an independent contractor as asserted by respondent. Claimant argues respondent should be estopped from claiming him as an independent contractor when "respondent's own documentation defined claimant as an employee of [respondent] and [respondent] as the employer."[2]

The issues for the Board's review are:

1. Is claimant an independent contractor or an employee of respondent?

2. Should claimant be estopped from denying his independent contractor status?

3. Does comity apply in this case?

FINDINGS OF FACT

Respondent, located in Oklahoma City, Oklahoma, recovers defaulted collateral for lien holders. Respondent assigns recovery accounts to field adjustors. The adjustors then attempt to recover the collateral, and if successful, they transport the collateral to respondent's storage facility.

Claimant became a field adjustor for respondent on September 8, 2011. Claimant testified he was subsequently fired in February 2012 because the tow wrecker he operated "went down and they told [him he] didn't have a job."[3] Claimant again became an adjustor for respondent in September 2012, when he was asked by Charles Wilson, respondent's president, to return to work. Mr. Wilson disputed claimant's testimony, stating respondent does not have the ability to fire an adjustor but rather has the right to terminate an adjustor's contract. Mr. Wilson agreed claimant did not perform any activity on behalf of

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[1] Respondent's Brief (filed May 1, 2014) at 16.

[2] Claimant's Brief (filed May 12, 2014) at 1.

[3] P.H. Trans. at 21.

respondent for a period of time after February 2012, but he did not know the reason for claimant's hiatus.

Claimant initially completed paperwork for respondent in September 2011, including an Affidavit of Exempt Status Under the Workers' Compensation Act.[4] This document, signed by claimant, indicates claimant is an independent contractor with the understanding he is not eligible for workers compensation benefits. Claimant also completed a Covenant Not To Compete And Non-Disclosure Agreement in September 2011, in which he was referred to as an "employee" and respondent as the "employer."[5] Although claimant received copies of each document upon his return to work in September 2012, he did not complete the paperwork a second time. Claimant testified:

> Q. Okay. So with regards to that affidavit, the second go around, you were asked to complete it, but you just didn't?
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> A. I asked, it was only E-mailed, nobody ever said anything to me. It just said employee packet and they never said anything, they never asked for it.[6]

Mr. Wilson agreed with claimant's testimony, stating "there was no need" for claimant to execute another affidavit, as he believed claimant was still covered under the two original agreements.[7]

Claimant testified he received his recovery orders via respondent's internet website. Claimant would then attempt to locate and repossess the collateral, usually a vehicle. Claimant stated respondent provided all information necessary for an assignment and specifically directed claimant how to do his job. Claimant testified he could not voluntarily retrieve other collateral without respondent's authorization. He also stated he did not have a choice as to whether he accepted assignments. If he did not accept the assignments, he would be fired.

Mr. Wilson disagreed with claimant's testimony, testifying field adjustors had the right to accept or reject assignments posted on respondent's online system. Mr. Wilson stated adjustors would have no adverse ramifications for choosing to decline an assignment other than compensation would not be received. On occasion, lien holders will set parameters concerning the recovery of collateral. This information is conveyed to the adjustor; however, Mr. Wilson testified it is left to the discretion of the adjustor as to how

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[4] *Id*., Resp. Ex. 1.

[5] P.H. Trans., Cl. Ex. 6 at 1.

[6] P.H. Trans. at 66.

[7] Wilson Depo. at 32.

and when to recover collateral. Mr. Wilson stated, "We don't control when the adjustor handles the account."[8]

After claimant obtained collateral, he transported it to respondent's storage facility in Wichita, Kansas. Claimant testified he took and sent both pictures and any damage information to respondent regarding the repossessed vehicles, cleaned the vehicles, and collected any personal property remaining in the vehicles for itemization and storage. Claimant completed paperwork. Claimant had a key to the storage facility provided to him by respondent.

Claimant testified an office on the storage facility site was provided for his use. Claimant stated respondent provided him with a key to the building because he was required to be present at the location every Monday and Friday between 11:00 a.m. and 1:00 p.m. to release vehicles and property as needed. Claimant testified part of his job requirement from respondent included office hours. Mr. Wilson disputed claimant's testimony, stating claimant was not required to use the office, as the office is for business purposes. Mr. Wilson explained claimant was free to use the office if he so desired, but it was not a requirement. Mr. Wilson testified claimant was never required to be at the storage facility/office:

> Q. Was [claimant] required to be there from 11:00 a.m. to 1:00 p.m. on Mondays and Fridays?
>
> A. No.
>
> Q. If he so testified, you would disagree with that?
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> A. I would.[9]

Claimant utilized a tow wrecker to retrieve collateral for respondent. Claimant testified he did not own the wrecker, but leased one supplied by Mr. Wilson. Claimant stated respondent paid for the wrecker's insurance and provided maintenance on the wrecker. Claimant admitted he performed oil changes on the wrecker from time to time, but generally contacted respondent to inform of the need for necessary maintenance. Further, claimant testified he was unable to use the wrecker for any job other than those assigned by respondent, per respondent's rules. Claimant explained he "couldn't tow other vehicles. [He] couldn't do personal work. . . . [He] had to do specifically [respondent's] work . . . ."[10]

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[8] *Id*. at 19.

[9] *Id*. at 28.

[10] P.H. Trans. at 23.

Mr. Wilson stated respondent never provided maintenance for claimant's wrecker except in unique situations, and if maintenance was provided, "payments were made for the repair . . . and then it was deducted from [claimant's] compensation."[11] Mr. Wilson agreed the wrecker was a leased unit, and claimant, not respondent, paid all lease payments. The wrecker was leased by a company other than respondent. However, Mr. Wilson later testified the wrecker was leased by Leasing Investment Auto Sales, a company of which Mr. Wilson is not only a corporate shareholder, but also the president. Mr. Wilson indicated respondent provided liability insurance for the protection of its clients.

Claimant was paid a flat fee for each collateral vehicle recovered. Claimant was also paid mileage, which included the distance between the location of the collateral and the storage facility in Wichita, Kansas. Claimant explained he would not receive the flat fee or mileage if collateral was not recovered. He could instead receive a close fee:

> Q. But in the unfortunate instance where the collateral had been moved and you couldn't locate the collateral, you would just chalk that up as a loss, a wasted day? Or how would that work?
>
> A. We would still get a close fee, if we could get it to close the bank would see we gave them all the information and they could see we did what we could do, and then they would give us a close fee.[12]

In the event claimant was instructed to travel a long distance to recover collateral, claimant testified respondent compensated lodging and meal expenses. Mr. Wilson testified claimant was never reimbursed expenses incurred while on assignment, and claimant was personally responsible for any incurred expenses. Mr. Wilson later stated claimant was given monies for lodging while out of state but not meals. Mr. Wilson explained this was not a regular occurrence. Mr. Wilson also testified:

> Q. Okay. Do you know if [respondent] ever provided a credit card to [claimant] to use while putting gas in the leased truck for picking up repossessed vehicles?
>
> A. I don't know if we ever advanced him money or not on his assignments. We may have certainly done that.
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> Q. Would you actually provide a credit card, to your knowledge, from [respondent]?
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> A. Sir, I don't – I wouldn't – I don't know if we provided him with a credit card or not. We could have possibly.
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> Q. Is there a person in charge keeping track of those expenses for your company?

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[11] Wilson Depo. at 15.

[12] P.H. Trans. at 46-47.

A. That would be me.[13]

On December 5, 2013, claimant lost control of the wrecker on a highway ramp, rolling the vehicle before it came to rest against a tree. Claimant explained he lost control of the wrecker when the steering wheel "locked up."[14] Claimant testified:

> The steering wheel would lock up if you hit the brakes just right. I told them several times about it and they never fixed it. Another guy before me told them. And they never fixed it. And they told him, they said no you don't work here you are fired. But if you hit the brake and didn't hit tow haul it would lock up and it locked up and took me right off the roadway.[15]

The Kansas Highway Patrol Accident Report noted claimant verbally informed the trooper at the scene he "lost control on the ramp. [Claimant] said that the snow on the roadway was to blame."[16]

Claimant was transported via ambulance to Wesley Medical Center from the accident scene. CT scans revealed claimant sustained anterior left rib fractures. Claimant was admitted to the hospital and treated for uncontrolled pain and difficulty breathing. Claimant was discharged on December 6, 2013, with instructions to follow up with his primary care physician as needed. Claimant followed up with a family practice facility where he was provided pain medication and muscle relaxants.

Dr. Pedro Murati, a board certified independent medical examiner, evaluated claimant at his counsel's request on February 3, 2014. Claimant presented with upper and lower back pain on the left, tenderness in the left ribs, tenderness and numbness in the left hip, and pain in the right shin. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Murati's impression included thoracic sprain, low back sprain, left SI joint dysfunction, left costochondritis, and status post left-sided rib fractures. Dr. Murati recommended claimant receive appropriate physical therapy, anti-inflammatory medication, pain medication, and injections. Dr. Murati also recommended temporary work restrictions. Dr. Murati opined claimant's diagnoses were a direct result of the December 5, 2013, accident. Dr. Murati wrote:

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[13] Wilson Depo. at 73.

[14] P.H. Trans. at 27.

[15] *Id*. at 27-28.

[16] Wilson Depo., Resp. Ex. 3 at 5.

> The claimant sustained a work related motor vehicle accident at work which resulted in mid back, low back, left hip, left ribs and right shin pain. . . . He has significant clinical findings that have given him diagnoses consistent with his described motor vehicle accident at work. Apparently, on this claimant's date of injury he sustained enough permanent structural change in the anatomy of his mid back, low back, right shin, left hip and left ribs which caused pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of his conditions is the motor vehicle accident at work.[17]

Claimant has not worked since the December 5, 2013, accident.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(c) states in part: "The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2013 Supp. 44-508(h) defines burden of proof: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record . . . ."[18]

It is often difficult to determine in a given claim whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.[19]

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[20] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[21]

> The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee, and the right to direct the

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[17] P.H. Trans., Cl. Ex. 2 at 4.

[18] *See Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[19] *See Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[20] *See Wallis v. Sec'y of Kansas Dep't of Human Res.*, 236 Kan. 97, 103, 689 P.2d 787, 792 (1984).

[21] *See Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

> manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[22]

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[23]

In *Marley v. M. Bruenger & Co., Inc.*,[24] it was noted:

> . . . Equitable estoppel is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct. A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. . . . (*United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc*., 221 Kan. 523, 527, 561 P.2d 792 [1977].)

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[22] *Wallis, supra,* at 102-03; citing *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[23] *See McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994). (The list was expanded to 20 in *Hill v. Kansas Dep't of Labor, Div. of Workers Comp*., 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 [2009] *aff'd in part, rev'd in part*, 292 Kan. 17, 248 P.3d 1287 [2011].)

[24] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 504, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[25] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[26]

ANALYSIS

1. Is claimant an independent contractor or an employee of respondent?

The ALJ found claimant was not an independent contractor. The undersigned Board Member agrees. Although not defined in the Act, our courts have consistently defined an independent contractor as one who, in exercising an independent employment, contracts to do certain work according to his or her own methods, without being subject to the control of the party he or she contracts with, except as to the results or product of his or her own work.[27] Our Supreme Court has held that the principal test is the "right of control" test.[28]

The Kansas Supreme court in *Wallis v. Sec'y of Kansas Dep't of Human Res.*,[29] citing *McCarty v. Great Bend Board of Education*,[30] wrote:

> [A]n independent contractor is one who, in the exercise of an independent employment, contracts to do a piece of work according to his own methods and who is subject to his employer's control only as to the end product or final result of his work. On the other hand, an employer's right to direct and control the method and manner of doing the work is the most significant aspect of the employer-employee relationship, although it is not the only factor entitled to consideration. An employer's right to discharge the workman, payment by the hour rather than by the job, and the furnishing of equipment by the employer are also indicia of a master-servant relation.

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[25] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[26] K.S.A. 2013 Supp. 44-555c(j).

[27] *Olds-Carter v. Lakeshore Farms, Inc.*, 45 Kan. App. 2d 390, 401, 250 P.3d 825 (2011), citing *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991); *Krug v. Sutton*, 189 Kan. 96, 98, 366 P.2d 798 (1961).

[28] *Danes v. St. David's Episcopal Church*, 242 Kan. 822, 831-32, 752 P.2d 653 (1988).

[29] *Wallis, supra,* at 103.

[30] *McCarty v. Great Bend Board of Education*, 195 Kan. 310, 403 P.2d 956 (1965).

In *Falls v. Scott*,[31] our Supreme Court wrote:

> [The test is] whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. [Citations omitted.]

The undersigned agrees with the ALJ that for the purposes of the Kansas Workers Compensation Act, claimant was, at the time of his accidental injury, an employee of respondent. The text messages placed into evidence support an element of control. The vehicle in which claimant worked was provided by or leased through a company affiliated with respondent. Respondent paid the liability insurance for the vehicle. The undersigned finds it disingenuous that Mr. Wilson would say carrying liability insurance has "nothing to do with a benefit to the field adjustor."[32]

Respondent relies on the workers compensation exemption agreement as evidence claimant is an independent contractor. K.S.A. 2013 Supp. 44-543(b) states, in part: "Any contract in which an employer requires of an employee as a condition of employment that the employee elect not to come within the provisions of the workers compensation act, shall be void." K.A.R. 51-21-1 provides that a "worker, under the act, cannot contract with the employer to relieve the latter of liability in case of an accident." As any such agreement is void in Kansas, the Affidavit of Exempt Status will not be considered as a part of the record.

The Covenant Not to Compete refers to employees, not contractors.[33] The confidentiality agreement also refers to the employee/employer relationship. Mr. Wilson made a point of stating he could terminate the contract with an adjustor, but he could not fire an adjustor. No contract or agreement setting forth terms of services to be provided by claimant was placed in the record.

2. Should claimant be estopped from denying his independent contractor status?

Respondent raised as an issue on appeal claimant is estopped from asserting employee status. This issue was not included in respondent's brief. The undersigned will not apply the doctrine of estoppel. The doctrine of equitable estoppel was applied to a

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[31] *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991).

[32] Wilson Depo. at 52.

[33] *See* P.H. Trans., Cl. Ex. 6.

workers compensation case in *Marley*.[34] The *Marley* court recognized equitable estoppel is premised on the principle of consistent conduct: "[I]t should [not] be permissible for a claimant in a workers compensation action to change his or her position."[35]

The *Marley* decision does not apply to the facts in this case. In *Marley*, after receiving approximately $40,000 in benefits from a liability insurance policy, the trucker claimed he was actually an employee in order to obtain workers compensation benefits. The Court of Appeals held the claimant was estopped to deny he was an independent contractor and not entitled to workers compensation benefits. In this case, claimant has always maintained he is an employee and, as far as the evidence shows, has not received benefits under the color of being an independent contractor. Claimant is not estopped from claiming employee status in this case.

Unlike *Marley*, in which the truck driver had consistently taken the position that he was an independent contractor prior to filing a workers compensation claim and benefitted financially from exercising his independent contractor status, the claimant in this case has consistently maintained that he is an employee for respondent.

3. Does comity apply in this case?

Respondent asks the Board to apply the principal of judicial comity to an unreported decision of the Oklahoma Court of Civil Appeals.[36] Judicial comity is a principle by which the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. Comity is not binding on the forum state, but is a courtesy extended to another state out of convenience and expediency.[37]

The undersigned will not apply the principal of comity to the unreported Oklahoma case placed into the record by respondent. *American Recovery Specialists v. Oklahoma Employment Security Commission* involves the interpretation of a specific Oklahoma statute relating to "individuals customarily engaged in an independently established trade," i.e. independent contractors, and the analysis of element of control required to determine if an individual is an employee or independent contractor.

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[34] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan.App.2d 501, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

[35] *Trevizo v. El Gaucho Steakhouse*, 45 Kan. App. 2d 667, 678, 253 P.3d 786 (2011); citing *Marley v. M. Bruenger & Co., Inc.*, 27 Kan.App.2d 501, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

[36] *American Recovery Specialists, Inc. v. Oklahoma Employment Security Commission, et al.,* No. 94,867 (Oklahoma Court of Civil Appeals unpublished opinion filed May 11, 2001).

[37] *Head v. Platte Co., Mo.*, 242 Kan. 442, 447, 749 P.2d 6 (1988). [Citations omitted].

The Oklahoma court's interpretation of an Oklahoma statute is irrelevant in Kansas. The court's analysis of right to control is a cursory discussion of a topic well covered by Kansas courts. The undersigned will look no further than the existing Kansas case law covering the topic of independent contractors. Comity will not be afforded the Oklahoma court decision in this case.

CONCLUSION

Claimant is an employee and not an independent contractor. Claimant is not estopped from denying independent contractor status. Comity will not apply to the finding of the Oklahoma Court of Civil Appeals in *American Recovery Specialists v. Oklahoma Employment Security Commission*.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Gary K. Jones dated April 7, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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